OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 26 September 2002 [1]

1. The present case arises from the appeal brought by Mr Pitsiorlas against the order made on 14 February 2001 (Case T-3/00 *Pitsiorlas* v *Council and European Central Bank* [2001] ECR II-717) by the Court of First Instance, declaring inadmissible his action for annulment of the Council's decision of 30 July 1999 refusing his application for access to documents relating to the 'Basle/Nyborg agreement' on the reinforcement of the European Monetary System.

Relevant law

2. Council Decision 93/731/EC of 20 December 1993 on public access to Council documents [2] stated the principle of access by the public to the Council's documents and laid down the relevant conditions and procedures.

3. For present purposes it should be noted first of all that the first two paragraphs of Article 2 provide:

'1. An application for access to a Council document shall be sent in writing to the Council. It must be made in a sufficiently precise manner and must contain information enabling the document or documents requested to be identified. Where necessary, the applicant shall be asked for further details.

2. Where the requested document was written by a natural or legal person, a Member State, another Community institution or body, or any other national or international body, the application must not be sent to the Council, but direct to the author'.

4. It should also be noted that, in terms of Article 6, '[a]ny application for access to a Council document shall be examined by the relevant departments of the General Secre-

1 — Original language: Italian.

2 — OJ 1993 L 340, p. 43. But this decision was revoked by Council Decision 2001/840/EC of 29 November 2001 (OJ 2001 L 313, p. 40) amending the Council's Rules of Procedure following the adoption of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

tariat, which shall suggest what action is to be taken on it'. Regarding this, Article 7 provides:

'1. The applicant shall be informed in writing within a month by the relevant departments of the General Secretariat either that his application has been approved or that the intention is to reject it. In the latter case, the applicant shall also be informed of the reasons for this intention and that he has one month to make a confirmatory application for that position to be reconsidered, failing which he will be deemed to have withdrawn his original application.

2. Failure to reply to an application within a month of submission shall be equivalent to a refusal, except where the applicant makes a confirmatory application, as referred to above, within the following month.

3. Any decision to reject a confirmatory application, which shall be taken within a month of submission of such application, shall state the grounds on which it is based. The applicant shall be notified of the decision in writing as soon as possible and at the same time informed of the content of Articles 138e and 173 of the Treaty establishing the European Community [now Articles 195 EC and 230 EC], relating respectively to the conditions for referral to the Ombudsman by natural persons and review by the Court of Justice of the legality of Council acts.

4. Failure to reply within a month of submission of the confirmatory application shall be equivalent to a refusal'.

Background and procedure

Facts giving rise to the dispute

5. The part of the order under appeal devoted to the facts shows:

'1. The applicant is preparing a doctoral thesis in law at the University of Thessaloniki in Greece.

2. By letter dated *6 April 1999*, received at the General Secretariat of the Council on 9 April 1999, he asked to have access, pursuant to Council Decision 93/731/EC of 20 December 1993 on public access to Council documents (OJ 1993 L 340, p. 43), as amended by Council Decision 96/705/EC, ECSC, Euratom, of 6 December 1996 (OJ 1996 L 325, p. 19), to the "Basle/Nyborg" Agreement on the

reinforcement of the European Monetary System (EMS) endorsed by the Council of Economic and Finance Ministers at their informal meeting at Nyborg, Denmark, on 12 September 1987.

3. In its letter of *11 May 1999*, communicated to the applicant on 15 May 1999, the General Secretariat of the Council responded in the following terms:

"The Secretariat General has given careful consideration to your request, but as it has not been possible to find the document, we believe that it is most probably a [European Central Bank] document. Your request should therefore be addressed directly to that institution...".

4. By letter dated *8 June 1999*, received at the General Secretariat of the Council on 10 June 1999, the applicant made a formal request pursuant to Article 7(1) of Decision 93/731.

5. By letter dated *5 July 1999* the General Secretariat of the Council notified the applicant that, because of the impossibility of taking a decision within the time-limit of one month under Article 7(3) of Decision 93/731, it had decided to extend this time-limit pursuant to Article 7(5), which provides:

"Exceptionally, the Secretary-General, having notified the applicant in advance, may extend by one month the time-limits laid down in the first sentence of paragraph 1 and in paragraph 3".

6. At the same time, by letter dated *28 June 1999* addressed to the Public Relations department of the European Central Bank (ECB), the applicant asked to have access to the document in question pursuant to ECB Decision 1999/284/EC of 3 November 1998 concerning public access to documentation and the archives of the European Central Bank (OJ 1999 L 110, p. 30). This request was refused by letter dated *6 July 1999*, and the applicant then asked, by letter dated *27 July 1999*, that this decision be reconsidered on the basis of Article 23.3 of the Rules of Procedure of the European Central Bank, adopted on 7 July 1998 (OJ 1998 L 338, p. 28), as amended on 22 April 1999 (OJ 1999 L 125, p. 34).

7. By letter dated 2 August 1999, notified to the applicant on 8 August 1999, the General Secretariat of the Council notified the applicant of the Council's decision of *30 July 1999* refusing the applicant's formal request (hereinafter "the Council

decision"). This decision was drafted in the following terms:

> "Following a detailed search, we have established that the document referred to in your request is the 'Report of the Committee of Governors on the reinforcement of the EMS', which was published by the Committee of Governors of the Member States of the EEC at Nyborg on 8 September 1987.
>
> Since the rules on the administrative functioning of the EMS have never formed part of Community law, the Council has never been called upon to take a decision of this nature.
>
> Since the document requested in this case was produced by the governors of the central banks, we suggest you address your request directly to the governors of the central banks or to the ECB".

8. In the same letter, the General Secretariat referred the applicant to the provisions of Articles 195 EC and 230 EC, on, respectively, the conditions for addressing complaints to the Ombudsman, and the review by the Court of the legality of acts adopted by the Council.

9. By letter dated *8 November 1999*, notified to the applicant on 13 November 1999, he was notified that the Governing Council of the ECB had decided not to give him access to the document in question (hereinafter the "ECB decision")' (emphasis added).

6. For the purpose of these proceedings it should further be noted that, in the letter of *6 July 1999*, the applicant's request for access was refused on the following grounds:

> '... documents from the Committee of Governors of the central banks of the Member States are not covered by the ECB decision (ECB/1998/12) but by Article 23.3 of the Rules of Procedure of the ECB (OJ 1999 L 125, p. 34), which provides that the documents of the Committee of Governors shall be freely available after a period of thirty years. Therefore I regret that I am unable to help you'.

7. Not until the ECB's subsequent decision of *8 November 1999*, confirming rejection of the application for access, was it mentioned that 'the Basle/Nyborg agreement is not, strictly speaking, a single document in the form of an agreement among the parties — it exists only in the form of reports and minutes produced by the Committee of Governors and the Monetary Committee'. More specifically, the ECB stated in the course of the proceedings

before the Court of First Instance,[3] the 'Basle/Nyborg agreement' essentially consists of two documents: (i) the 'Report of the Committee of Governors on the reinforcement of the EMS' (written at Basle on 8 September 1987), to which the Council's decision to deny access referred; (ii) a report prepared by the Monetary Committee, a consultative organ of the Council,[4] entitled 'Le renforcement du SME — Rapport du Comité monétaire à la réunion informelle des ministres des finances, Nyborg, le 12 septembre 1987'. It was on the basis of both reports that, at the informal meeting at Nyborg on 12 September 1987, the Council officially adopted the modifications to be made to the arrangements for operation of the SME agreement of 13 March 1979.[5]

The proceedings before the Court of First Instance and the order under appeal

8. As we have seen, it was from the ECB decision of *8 November 1999*, notified to him on *13 November 1999*, that Mr Pitsiorlas learned of the ECB's final refusal to give him access to the 'Basle/Nyborg agreement' and that the 'agreement' consisted of 'reports and minutes' produced not only by the Committee of Governors of the central banks of the Member States but also by the Monetary Committee which, as said earlier, is a consultative organ of the Council and, therefore, responsible for access to the documentation concerned. The applicant considered that that decision was unlawful and, deducing from the grounds given that the Council's decision of *30 July 1999* (essentially denying the existence of Council documents forming part of the 'Basle/Nyborg agreement') was also unlawful, he brought the action of *20 January 2000* against both decisions together, under Article 230 EC, before the Court of First Instance.

9. The Council did not comment on the merits of the case but, under Article 114 of the Rules of Procedure of the Court of First Instance, raised a plea that Mr Pitsiorlas's application was inadmissible to the extent that it related to the Council's decision of *30 July 1999*; it also objected that it was out of time. In response to that plea, the applicant observed that the failure to observe the time- limit was due to excusable error, maintaining that he had been deceived by the two institutions involved, for they had deliberately induced him not to make an immediate challenge to the Council decision, pending the confirmatory response from the ECB. Mr Pitsiorlas observed in particular that there was no point in making an immediate challenge to the decision by the Council, which had expressly denied being in possession of the document requested; it was only through

3 — Counterclaim by the ECB, points 3 and 4.

4 — The Monetary Committee existed from 1958 to 1998: it was established in Article 105 of the EEC Treaty, as a consultative organ of the Council, 'to promote coordination of the policies of Member States to the full extent needed for the functioning of the internal market'. That provision remained in force until 1 November 1993 when, upon entry into force of the Maastricht Treaty, it was replaced by the first paragraph of Article 109c of the EC Treaty (now Article 114 EC). As from 1 January 1999, at the start of the third stage of the Economic and Monetary Union, the Monetary Committee was dissolved and replaced by the Economic and Financial Committee.

5 — 'Accord fixant entre les banques centrales des États membres de la Communauté économique européenne les modalités de fonctionnement du système monétaire européen.'

the ECB's confirmatory decision — which had been adopted after a lengthy and serious delay — that he had in fact understood that the Council had denied him access unlawfully.

10. By order of 14 February 2001 the Court of First Instance upheld the Council's plea and so ruled that Mr Pitsiorlas's action, 'in so far as directed against the Council decision of 30 July 1999,' was inadmissible.

11. In particular, the Court noted that, '[u]nder the fifth paragraph of Article 230 EC the time-limit for bringing an action for annulment is two months from, depending on the case, the publication of the act, its notification to the applicant or, in default, the time when the latter knew of the act. In accordance with the combined provisions of Article 102(2) of the Rules of Procedure of the Court of First Instance and Annex II to the Rules of Procedure of the Court of Justice, this time-limit must, additionally, be increased on account of distance by 10 days for parties resident in Greece' (paragraph 19). It then noted that, in this case, 'the Council decision was notified to the applicant on 8 August 1999 by letter from the General Secretariat. Adding the allowance for distance, the time for bringing an action for annulment of this decision therefore expired on Monday 18 October 1999 at midnight' (paragraph 20). Therefore, the application having been lodged on 20 January 2000, the Court of First Instance found that the action was time-barred (paragraph 21).

12. Regarding the 'excusable error' alleged by the applicant, the Court of First Instance then observed as follows:

'22. According to settled case-law, an excusable error may, it is true, in exceptional circumstances have the effect of not causing the applicant to be out of time (Case 25/68 *Schertzer* v *Parliament* [1977] ECR 1729, paragraph 19; Case 117/78 *Orlandi* v *Commission* [1979] ECR 1613, paragraph 11; Case C-165/99 *Austria* v *Commission*, order of 26 October 2000, not published in the European Court Reports, paragraph 17). This is so, in particular, when the conduct of the institution concerned has been, either alone or to a decisive extent, such as to give rise to pardonable confusion in the mind of a party acting in good faith and exercising all the diligence required of a normally experienced person (*Blackman* v *Parliament*, paragraph 34, and *Bayer* v *Commission*, paragraph 26).

23. However, in this case, the applicant has adduced no evidence in support of his assertion that the Council adopted such behaviour. It should be noted, by contrast, that pursuant to Article 7(3) of Decision 93/731, the General Secretariat's letter notifying the applicant of the Council decision pointed out to him, furthermore, the content of Articles 195 EC and 230 EC which concern, respectively, the conditions

for addressing complaints to the Ombudsman, and the review by the Court of the legality of acts adopted by the Council. Therefore a normally diligent individual could have been left in no doubt either as to the finality of this decision, or as to the time-limit for bringing proceedings laid down by Article 230 EC.

24. Given that the circumstances put forward by the applicant cannot be regarded as exceptional circumstances giving rise to an excusable error, the action against the Council decision must be dismissed as inadmissible.'

Proceedings before the Court of Justice

13. In an application lodged on 7 May 2001, Mr Pitsiorlas appealed against the order of the Court of First Instance, claiming that the Court of Justice should: hold the appeal admissible and well founded; set aside the order under appeal; annul the Council decision of 30 July 1999, upholding the claims put forward at first instance or, in the alternative, refer the case back to the Court of First Instance for a ruling on the merits of the case; order the Council to pay costs at first instance and on appeal. In support of the request to set aside the order of the Court of First Instance, Mr Pitsiorlas cited in particular: (i) infringement of Article 114 of the Rules of Procedure of the Court of First Instance; (ii) infringement of the principle of equality of arms; (iii) misinterpretation of the Council decision; (iv) an error in consideration of the facts, resulting in infringement of Article 42 of the Statute of the Court of Justice; (v) failure to apply the Community case-law concerning excusable error or, in the alternative, an excessively strict application of that case-law.

14. In its defence, the Council merely noted the late submission of the appeal, asking the Court to hold it to be manifestly inadmissible; only at the hearing did it make a brief reply to the applicant's complaints regarding the order under appeal.

Legal analysis

Admissibility

15. The Council disputed the admissibility of the appeal, maintaining that the application should have been submitted no later than 3 May 2001 (two months and 10 days after notification of the order from the Court of First Instance, which was on

23 February 2001),[6] but it was not lodged at the Registry of the Court of Justice until 7 May.

16. However, as the appellant observed, that objection was unfounded, because the Council erred in failing to consider that, before the appeal was lodged, on 7 May 2001, it had already been received at the Registry by fax in the evening of 2 May 2001 and was then recorded the following morning. The new paragraph 6 in Article 37 of the Rules of Procedure of the Court of Justice provides that 'the date on which a copy of the signed original of a pleading... is received at the Registry by telefax or other technical means of communication available to the Court shall be deemed to be the date of lodgment for the purposes of compliance with the time-limits for taking steps in proceedings, provided that the signed original of the pleading, accompanied by the annexes and copies referred to in the second subparagraph of paragraph 1 above, is lodged at the Registry no later than ten days thereafter'.[7] I therefore consider that the appeal must be declared admissible.

Merits of the case

17. Turning to the merits of the case, for reasons of procedural economy I believe that we should concentrate on the fifth ground of appeal, in which Mr Pitsiorlas objects to the finding by the Court of First Instance that the lateness of the application could not be regarded as arising from 'excusable error'.

18. In particular, the applicant maintains here that the Court of First Instance adopted too formalistic an approach when considering whether there was excusable error, attaching excessive importance to the fact that the decision under appeal mentioned that a challenge could be raised pursuant to Article 230 EC. According to the appellant, the Court of First Instance should in fact have taken into consideration the specific features and the exceptional circumstances of this case and, in particular, the inaccuracies whereby the Council and the ECB misled him: the former by concealing the existence of the Monetary Committee's report on the reinforcement of the EMS and the latter by delaying the decision in which it refers to that report, adopting that decision only after expiry of the period for challenging the Council's corresponding decision. Because of those special circumstances, in fact, he was unable to display greater diligence, considering also the exceptionally complex nature of the 'Basle/Nyborg agreement' and the general lack of transparency of the matter of monetary policy. The Court of First Instance therefore erred in law when it found that there was no excusable error capable of justifying the lateness of the challenge.

19. But, countering those arguments, the Council observed at the hearing that the Court of First Instance was right to find

6 — On this, see Article 49 of the Statute of the Court of Justice and Article 81(2) of the Rules of Procedure of the Court.

7 — This paragraph was added by means of the 'Amendments to the Rules of Procedure of the Court of Justice of the European Communities of 28 November 2000' (OJ 2000 L 322, p. 1).

that the lateness of the action was not due to excusable error in accordance with Community case-law: it considered that the appellant had not shown that the Council's conduct was such as to mislead him since, by means of the express indication that proceedings could be brought under Article 230 EC, he had been clearly informed of the finality of this decision.

20. For my own part, I must note first of all that 'it is consistent case-law that the concept of excusable error, which arises directly out of the concern for respect of the principles of legal certainty and the protection of legitimate expectations, can concern only exceptional circumstances in which, in particular, the conduct of the institution concerned has been, either alone or to a decisive extent, such as to give rise to a pardonable confusion in the mind of a party acting in good faith and exercising all the diligence required of a normally experienced person'. [8] In particular, it has been held that there may be excusable error 'where the late submission of an application has been caused by the fact that the institution concerned has provided information which is wrong or such as to give rise to a pardonable confusion in the mind of a party as described above, or where that institution's breach of any of its internal rules, as for example a code of conduct, has given rise to such confusion'. [9]

21. As we have seen, in the order under appeal the Court of First Instance found that the lateness of the action could not be justified by any excusable error because, it held, Mr Pitsiorlas had not shown that the Council's conduct had been such as to give rise to 'pardonable confusion in the mind of a party acting in good faith and exercising all the diligence required of a normally experienced trader'. Since the contested decision mentioned that proceedings could be brought under Article 230 EC, the Court of First Instance held that 'a normally diligent individual could have been left in no doubt either as to the finality of this decision, nor as to the time-limit for bringing proceedings'.

22. However, I agree with Mr Pitsiorlas that the Court of First Instance adopted too formalistic and restrictive an approach in applying the case-law concerning excusable error.

23. I consider that the Court of First Instance was not justified in omitting to consider that the contested decision was

8 — Order of the Court of First Instance in Case T-218/01 *Laboratoire Monique Rémy* v *Commission* [2002] ECR II-2139, paragraph 30, citing in support: judgment of the Court of First Instance in Case T-12/90 *Bayer* v *Commission* [1991] ECR II-219, paragraphs 28 and 29, confirmed by the judgment of the Court of Justice in Case C-195/91 P *Bayer* v *Commission* [1994] ECR I-5619, paragraph 32; order of the Court of First Instance in Case T-63/96 *Fichter* v *Commission* [1997] ECR-SC I-A-189 and II-563, paragraph 25, confirmed by the order of the Court of Justice in Case C-312/97 P *Fichter* v *Commission* [1998] ECR I-4135; and order of the Court of First Instance in Case T-68/96 *Polyrios* v *Commission* [1998] ECR II-153, paragraph 43.

9 — Ibid.

such as to mislead the applicant as to the existence of a Council document forming part of the 'Basle/Nyborg agreement': by indicating that the governors of the central banks were the authors of the document requested, the contested decision inevitably led the applicant to believe that the Council was not able to accede to his application for access because the 'agreement' comprised only the report of the Committee of Governors (and, therefore, not the Monetary Committee's report on the reinforcement of the EMS). Relying on those indications, therefore, Mr Pitsiorlas had no reason to challenge a decision which prevented access to a document which essentially it denied even existed.

24. It is perfectly clear that Community institutions 'cannot accede to a request for access to documents which do not exist', and it is also clear that 'in accordance with the presumption of legality attaching to Community acts, where the institution concerned asserts that a particular document to which access has been sought does not exist, there is a presumption that it does not', unless it is shown to exist 'by relevant and consistent evidence'. [10] Since the applicant had no evidence of the existence of the Monetary Committee report on the reinforcement of the EMS, he could not but believe the Council's assertion that the 'Basle/Nyborg agreement' comprised only the report of the Committee of Governors and he therefore had no grounds for disputing the decision.

25. I consider that it should be inferred from this that the Council's conduct was such as to cause Mr Pitsiorlas not to challenge the decision of 30 July 1999 in good time. It was only from the ECB's decision of 8 November 1999, notified to him on 13 November 1999, that he in fact learned that the 'Basle/Nyborg agreement' consisted of 'reports and minutes produced by the Committee of Governors and the Monetary Committee', and so also a consultative organ of the Council. Thus, it was not until then that he had reason to doubt the propriety of the Council's decision, coming to the conclusion that that institution had deliberately concealed the existence of the report from the Monetary Committee. Having realised the error into which the Council had led him, he therefore brought proceedings on 20 January 2000 against the decision by which the institution had prevented him gaining access to the report of the Monetary Committee, by failing to state that it existed.

26. Nor do I think the appellant can be criticised for not having acted like 'a party acting in good faith and exercising all the diligence required of a normally experienced trader'. After receiving the Council's first letter of refusal of 11 May 1999, indicating that the document requested was most probably a document of the ECB, on 28 June 1999 Mr Pitsiorlas diligently 're-directed' the request for access to the latter.

10 — Judgment of the Court of First Instance in Case T-311/00 *British American Tobacco (Investments)* v *Commission* [2002] ECR II-2781, paragraph 35, which makes a further reference to that Court's judgment in Case T-123/99 *JT's Corporation* v *Commission* [2000] ECR II-3269, paragraph 58.

And it is clear that if, in the response of 6 July 1999, the ECB had mentioned the existence of the report of the Monetary Committee, Mr Pitsiorlas would immediately have been in a position to question the legality of the Council's subsequent decision of 30 July 1999. Mr Pitsiorlas gave further evidence of his diligence when, on 27 July 1999, he submitted a request for reconsideration to the ECB, which did not respond until 8 November 1999, which is long after the period of one month laid down in Article 5(3) of Decision 1999/284/EC of 3 November 1998 concerning public access to documentation and the archives of the Bank.

27. That being the case, I consider that the appellant did indeed act with 'the diligence required of a normally experienced trader'. This assertion cannot be countered by the fact that, once Mr Pitsiorlas had received the ECB decision of 8 November 1999, he was in a position to apply again to the Council for access, relying on the information acquired in the meantime. The reason for that is, I believe, that (apart, of course, from the problem of the time-limit for proceedings) Mr Pitsiorlas was in any case entitled to apply to the Community Courts seeking annulment of the Council's decision of 30 July 1999. As the Court of First Instance noted on an earlier occasion, '[t]he objective of Decision 93/731 is to give effect to the principle of the largest possible access for citizens to information with a view to strengthening the democratic nature of the institutions and the trust of the public in the administration. Decision 93/731, like Decision 94/90, does not require that members of the public must put forward reasons for seeking access to requested documents. It follows that a person who is refused access to a document or to part of a document has, by virtue of that very fact, established an interest in the annulment of the decision'; and indeed, that interest is not removed even by the 'fact that the requested documents were already in the public domain'. [11]

28. Therefore I do not believe that Mr Pitsiorlas can be criticised for lack of diligence in not having made a further application for access to an institution which had previously given him a misleading response but choosing rather to challenge that response. The diligence required to justify the lateness of the application on the basis of excusable error must be measured only against the conditions applying to the challenge to the decision to refuse access, and the applicant's conduct in seeking to obtain the documents in question is irrelevant. As is shown by the judgment of the Court of First Instance referred to, an interest in making a challenge to a refusal is in any case not removed by the fact that it is possible to submit a further request for access or that the applicant has taken action to obtain the documents requested.

29. In the light of the whole of the foregoing, I am of the opinionthat the Court of

11 — Judgment in Case T-174/95 *Svenska Journalistforbundet* v *Council* [1998] ECR II-2289, paragraphs 66, 67 and 69.

First Instance erred in law in finding that the lateness of Mr Pitsiorlas's application was not justified by excusable error in accordance with Community case-law. Therefore, upholding the fifth ground of appeal, I consider that the order under appeal should be set aside and that there is no need to consider the other pleas submitted by Mr Pitsiorlas.

30. Since the order under appeal upheld a plea of inadmissibility raised by the Council, under Article 114 of the Rules of Procedure of the Court of First Instance, without considering the merits of the action, I am of the opinion that the case must be referred back to the Court of First Instance so that the parties may be heard in full. The decision as to costs should consequently be reserved.

Conclusion

31. For the foregoing reasons, I propose that the Court of Justice should rule as follows:

— The order made by the Court of First Instance on 14 February 2001 in Case T-3/00 *Pitsiorlas* v *Council and European Central Bank* is set aside;

— The case is referred back to the Court of First Instance for it to adjudicate on the merits of the case;

— Costs are reserved.